

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW MEXICO**

THERESA JAMES, as wrongful death estate  
representative for Jay Murphy, Sr., deceased, and as  
custodial parent and next friend of her daughter, M.,  
a minor,

Plaintiff,

vs.

No. CIV 09-0540 JB/CG

MARTIN CHAVEZ, III, individually and in his  
official capacity as Mayor of the City of  
Albuquerque, RAY SCHULTZ, individually and in  
his official capacity as Chief of Police of the City of  
Albuquerque, RUSSELL CARTER, individually and  
in his official capacity as an officer of the  
Albuquerque Police Department "S.W.A.T." Team,  
MICHAEL FOX, individually and in his official  
capacity as an Officer (Detective) of the Albuquerque  
Police Department, CITY OF ALBUQUERQUE, as  
an Albuquerque Police Department, a municipal  
entity organized under the laws of the State of New  
Mexico and its law enforcement agency, JOSH  
BROWN, an Officer of the Albuquerque Police  
Department, individually.

Defendants.

**MEMORANDUM OPINION AND ORDER**

**THIS MATTER** comes before the Court on the City Defendants' Motion for Partial Summary Judgment No. II: Dismissal of the Estate's Fourth Amendment Excessive Force Claim Against Officer Brown, filed August 16, 2011 (Doc. 104)("MSJ"). The Court held a hearing on October 4, 2011. The primary issue is whether the Court should enter summary judgment against Plaintiff Theresa James on the claims she has asserted against Defendant Josh Brown. Because Plaintiff Theresa James does not dispute whether the Court should enter summary judgment on her

claims against Brown, the Court will enter summary judgment on James' Fourth Amendment excessive force claims against Brown. The Court will not deem James' decision to not contest this Motion for Summary Judgment as an admission or endorsement of the factual premises offered in support of the Motion for Summary Judgment. Because James does not contest the Court entering judgment on her claims against Defendant Michael Fox rather than require James to file a notice of voluntary dismissal of those claims, the Court will also enter judgment on her claims against Fox.

### **PROCEDURAL BACKGROUND**

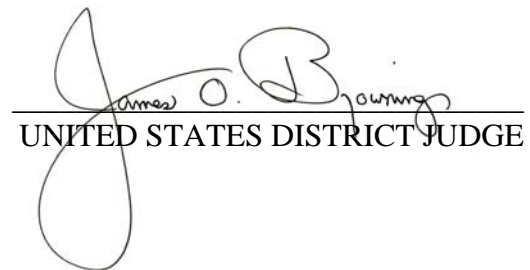
On August 16, 2011, the Defendants filed their Motion for Summary Judgment. The Defendants ask the Court to enter summary judgment on James' Fourth Amendment excessive force claim against Brown. See MSJ at 27. In the Response to the Motion for Summary Judgment, James stated that she "does not oppose the relief sought in this motion, which is dismissal of the claims brought against Officer Brown." Plaintiff's Response to City Defendants' Second Motion for Partial Summary Judgment (Doc. No. 104) at 1, filed September 8, 2011 (Doc. 119)("Response"). James clarified that her "concurrence in the relief sought is not, however, in any way, shape or form an endorsement of the factual premises offered in support of the motion." Response at 1. James specifically contested several facts regarding Carter's involvement in the shooting of Murphy Sr. At the October 4, 2011 hearing, James reiterated that she did not oppose entering summary judgment on these claims against Brown. See Transcript of Hearing at 3:15-21 (taken October 4, 2011)(Lyle)("Tr.").<sup>1</sup> James also agreed to the voluntary dismissal of the claims against Fox. See Oct. 4, 2011 Tr. at 5:22-6:9, 7:9-14 (Beach, Court, Lyle). At the October 28, 2011 hearing, the parties agreed that the Court could enter judgment on James' claims against Fox in one

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<sup>1</sup>The Court's citations to the transcripts of the hearings refer to the court reporter's original, unedited versions. Any final transcripts may contain slightly different page and/or line numbers.

of its orders disposing of a motion for summary judgment or motion to dismiss rather than require James to file a notice of voluntary dismissal of those claims. See Transcript of Hearing at 14:7-16 (taken October 28, 2011)(“Oct. 28, 2011 Tr.”)(Court, Lyle).

**IT IS ORDERED** that the City Defendants’ Motion for Partial Summary Judgment No. II: Dismissal of the Estate’s Fourth Amendment Excessive Force Claim Against Officer Brown, filed August 16, 2011 (Doc. 104) is granted. Because Plaintiff Theresa James does not dispute whether the Court should enter summary judgment on her claims against Brown, the Court will enter summary judgment on the James’ Fourth Amendment excessive force claims against Brown. The Court will not deem James’ decision to not contest this Motion for Summary Judgment as an admission or endorsement of the factual premises offered in support of the Motion for Summary Judgment. Because James does not contest the Court entering judgment on her claims against Defendant Michael Fox rather than require James to file a notice of voluntary dismissal of those claims, the Court will also enter judgment on her claims against Fox.



UNITED STATES DISTRICT JUDGE

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